

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEVON RECALD JAMES,

Defendant-Appellant.

UNPUBLISHED

March 3, 2005

No. 251719

Macomb Circuit Court

LC No. 03-000538-FC

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, second-degree fleeing and eluding, MCL 257.602a(4)(b), and possession of a firearm during the commission or attempted commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 225 to 360 months' imprisonment for the armed robbery conviction, 76 to 120 months' imprisonment for the second-degree fleeing and eluding conviction, and two years, to be served consecutively to his other convictions, for the felony-firearm conviction. We affirm.

Defendant first claims that the trial court violated his due process rights when it refused to suppress a lineup identification, where the lineup was impermissibly suggestive. We disagree.

This Court reviews a trial court's factual findings at a suppression hearing for clear error, but reviews de novo the lower court's ultimate ruling. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002).

Just prior to the start of the trial, defendant moved for a lineup identification. Upon this request, the prosecutor brought up the fact that it was possible that one or more of the witnesses may have seen defendant at a prior proceeding. Defendant's trial counsel disagreed and stated that he did not believe that any of the witnesses had seen defendant at a prior proceeding. The trial court granted defendant's motion and postponed the trial in order to give defendant an opportunity to conduct the lineup. At the lineup one of the witnesses identified defendant as the perpetrator of the robbery. Defendant then obtained new counsel, who moved to suppress the lineup identification on the ground that the lineup was impermissibly suggestive because the witness had seen defendant at an earlier proceeding.

Because defendant moved for the lineup identification, he cannot now claim that the grant of his motion was error mandating reversal. *People v McCray*, 210 Mich App 9, 14; 533

NW2d 359 (1995). Furthermore, defendant knowingly assumed the risk that the lineup might have been tainted and, therefore, waived his right to seek appellate review. *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004) (“Under the doctrine of invited error, a party waives the right to seek appellate review when the party’s own conduct directly causes the error.”), citing *People v Jones*, 468 Mich 345, 352; 662 NW2d 376 (2003). This waiver extinguished any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Next, defendant claims that the trial court erred in omitting the aggravating factor of a previous conviction for fleeing and eluding when instructing the jury on the elements of second-degree fleeing and eluding. Defendant contends that, because of this error, he is entitled to a new trial on the fleeing and eluding charge or to a sentence consistent with the findings of the jury. We disagree.

The prosecutor asked the court to omit the aggravating element (i.e., the existence of previous fleeing and eluding conviction) from the jury instructions on the elements of second-degree fleeing and eluding. See MCL 257.602a(4). Defense counsel expressly agreed with the prosecutor that they did not want to put evidence of defendant’s previous conviction for fleeing and eluding before the jury and stated that the omission of that element would be fine. The trial court granted the request and did not instruct the jury regarding this element. A defendant may stipulate to or admit a prior conviction that is a necessary element of a charged crime in order to avoid the prejudice associated with the prosecution’s proof of that element. See *People v Green*, 228 Mich App 684, 691; 580 NW2d 244 (1998). Furthermore, a “defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial.” *Id.* Therefore, defendant knowingly waived his right to have the jury instructed on this element and there was no error to review. *Carter, supra* at 215.

Defendant also argues that this Court should consider whether defendant’s trial counsel was constitutionally ineffective by agreeing to waive the instruction on this element of the fleeing and eluding offense. However, this issue is not properly before this Court because it was not raised in the statement of the questions presented. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Even if this issue were properly before us, we would not find that defendant received the ineffective assistance of counsel. The effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To overcome this burden, a defendant must first show that his counsel’s performance was below an objective standard of reasonableness under the circumstances and according to prevailing professional norms and then must show that there is a reasonable probability that but for counsel’s errors, the trial outcome would have been different. *Id.* at 663-664. Given that the prosecutor could easily have proven defendant’s previous conviction for fleeing and eluding, we cannot say that defendant’s trial counsel acted unreasonably nor can we see how defendant was prejudiced by this waiver.

Finally, defendant claims that the trial court erred when it sentenced him for second-degree fleeing and eluding consecutive to his sentence for his felony-firearm conviction. We agree.

“Whether the trial court properly sentenced a defendant to consecutive sentences is a question of statutory interpretation that is reviewed de novo.” *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003). “A consecutive sentence may be imposed only if specifically

authorized by law.” *Gonzalez, supra* at 229. Our Supreme Court has interpreted the language of the felony-firearm statute and ruled that “the Legislature intended that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony.” *People v Clark*, 463 Mich 459, 463; 619 NW2d 538 (2000). The felony-firearm statute only permits consecutive sentencing with the conviction for the predicate offense. *Id.* at 464. In this case, when instructing the jury on the elements of felony-firearm, the trial court limited its instructions to the charge of possessing a firearm at the time of the armed robbery. The court never instructed the jury on the charge that defendant possessed a firearm at the time he committed the crime of second-degree fleeing and eluding. Therefore, only the armed robbery was a predicate offense of the felony-firearm charge. See *id.* at 464 n 11. Consequently, the trial court erred in making defendant’s sentence for second-degree fleeing and eluding run consecutive to his felony-firearm sentence.

Affirmed, but remanded to the trial court for entry of an amended Judgment of Sentence with the felony-firearm conviction running consecutive only to the robbery conviction. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski